Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

In the Supreme Court of the United States
October Term, 1998

WAYNE JACKSON, DEPUTY WARDEN,

Petitioner,

v.

JEFFREY DYE AND GREGORY TURNER,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the attorney fee provision of the Prison Litigation Reform Act, PLRA § 803, 42 U.S.C. § 1997e(d), apply to fees for services in litigation which was pending on the effective date of the PLRA?

PARTIES TO THE PROCEEDING

At the time of the events giving rise to this litigation, Petitioner, Wayne Jackson was a Deputy Warden at the State Prison of Southern Michigan at Jackson and, Respondents, Jeffrey Dye and Gregory Turner were inmates confined by the Michigan Department of Corrections.

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Petitioner respectfully petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on December 15, 1998.

OPINIONS BELOW

The December 15, 1998 opinion of the Court of Appeals is not reported and is reprinted in the Appendix to this Petition, App. 1a-6a. The prior opinions of the United States District Court of the Eastern District of Michigan, entered May 22, 1997 are not reported, and are reprinted in the Appendix to this Petition, App. 7a-15a.

JURISDICTION

Petitioners seek review of the opinion of the United States Court of Appeals for the Sixth Circuit entered on December 15, 1998.

This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 802(b)(1) of the Prison Litigation Reform Act, 18 U.S.C. § 3626, provides:

> Section 3626 of title 18, United States Code, as amended by this section, shall apply with respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of the enactment of this title.

Section 803(d) of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(d), amending section 7 of the Civil Rights of Institutionalized Persons Act provides:

(d) ATTORNEY'S FEES.-(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 2 of the Revised Statutes of the United States (42 U.S.C. 1988), such fees shall not be awarded, except to the extent that -

(A) the fee was directly and reasonably incurred in proving an actual violation of the Plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 2 of the Revised Statutes; and

(B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or

(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the Defendant. If the award of attorney fees is not greater than 150 percent of the Judgment, the excess shall be paid by the Defendant.

(3) No award of attorney fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3055A of Title 18, United States Code, for payment of court-appointed counsel.

(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the

fee is paid by the individual rather than by the Defendant pursuant to section 2 of the Revised Statutes of the United States (42 U.S.C. 1988).

STATEMENT OF THE CASE

This case concerns an award of attorney fees in a prisoner civil rights case brought pursuant to 42 U.S.C. § 1983. Respondents filed this case in the district court in 1995, claiming Petitioner failed to protect Respondents from assaults by other inmates, in violation of the Eighth Amendment. Respondents claimed they had each repeatedly told Petitioner about their fears of assault by other inmates, but Petitioner failed to take any action to protect either Respondent. Each of the Respondents claimed he was ultimately assaulted by other inmates. The cases were initially tried resulting in a hung jury. On retrial a second jury found liability, but awarded zero damages. Petitioner moved for a judgment as a matter of law, while Respondents moved for a new trial limited to compensatory and punitive damages only. The district court then ordered new trials for each of the Respondents as to compensatory damages only.

The third and fourth juries awarded Respondent Turner $13,000 and Respondent Dye $5,000.00. The district court entered judgments on December 2, 1996. App., p. 2a. Thereafter Respondents, as prevailing parties, applied for attorney fees. Respondents applied for $36,000 for attorney Manville's fees based on an hourly rate of $150.00. Respondents sought $6250.00 in fees based on an hourly rate of $125.00 for attorney Steinberg's work. (App., pp. 1a-6a.) In addition, Respondents requested $13,555.00 as attorney fees for litigating the question of attorney fees. (App., p. 1a, fn 1) Petitioner argued that the PLRA should be applied to limit the award of attorney fees.

The Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321-66 (1996), (PLRA), was signed into law by President Clinton and took effect on April 26, 1996.[1] The PLRA was intended to stem the tide of frivolous prisoner

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[1] The PLRA is found in Title VIII of the omnibus appropriation bill for the fiscal year 1996 for the Departments of Commerce, Justice and State, the Judiciary and Related Agencies.

suits[2] and to curtail the overly intrusive involvement of federal courts in managing state prison systems pursuant to remedial orders and consent decrees. Section 803(d) of the PLRA includes the provision governing the award of attorney fees in prisoner civil rights litigation.

The PLRA's effective date was April 26, 1996. In the United States District Court for the Eastern District of Michigan, $75.00 per hour is the maximum amount a court-appointed attorney may be reimbursed pursuant to 18 U.S.C. § 3006A(d)(1), thus if 42 U.S.C. § 1997e(d)(3) applies the maximum hourly rate is $112.50 (150 percent of $75.00).

In the district court, Petitioner argued that several provisions of the PLRA should limit the fees sought by Respondents:

> Respondents can recover no more than 150% of the judgments, ie, $27,000 for attorney fees from Petitioner. The Respondents' attorneys would have to collect any fees in excess of $27,000 from Respondents. 42 U.S.C. § 1997e(d)(2).
>
> The maximum hourly rate for either of Respondents' attorneys should be limited to $112.50. 42 U.S.C. § 1997e(d)(3).
>
> Respondents should be required to pay as much as 25% of their combined judgments of $18,000.00, ie. $4500.00 to their attorneys for attorney fees. 42 U.S.C. § 1997e(d)(2).
>
> Respondents cannot recover fees for litigating the issue of attorney fees. 42 U.S.C. §

[2] *See, e.g.*, 141 Cong. Rec. S14316 (daily ed., Sept. 26, 1995) (statement of Sen. Abraham) (in addition to problems with "massive judicial interventions in state prison systems, we also have [the problem of] frivolous inmate litigation); 141 Cong. Rec. S14414 (daily ed., Sept. 27, 1995) (statement of Sen. Dole) (legislation introduced, S. 1279, will address the "alarming number of frivolous lawsuits" filed by prisoners).

1997e(d)(1).

Despite the fact that the final judgments in this case were entered by the District Court in December 1996, well after the PLRA's April 26, 1996 effective date, the district court declined to apply the PLRA and awarded Respondents $41,130.00 based on an hourly rate of $150.00 per hour for the work of Mr. Manville and awarded Respondents $14,675.00 for Mr. Steinberg's work based on an hourly rate of $125.00 per hour. (App., p. 6a.)

Both Respondents and Petitioner appealed. On appeal Petitioner raised a number of issues, only one of which is pertinent here: Petitioner argued that the district court erred in failing to apply the PLRA limits to the Respondents' attorney fee petition.

On December 15, 1998, without discussion, the Court of Appeals issued its Opinion affirming the District Court's decision that held the PLRA fee provision inapplicable to fees in this case stating: "Jackson's final ground for appeal, that the Prison Litigation Reform Act should be applied retroactively to limit Dye and Turner's recovery of attorney's fees also fails. In *Hadix v. Johnson*, 143 F.3d 246, 248 (6th Cir. 1998), this Court held that the Act should not be applied retroactively." (App., p. 10a.) One month earlier on November 16, 1998, this Court granted certiorari in *Johnson v. Hadix*, No. 98-262, and it remains pending.

REASONS FOR GRANTING THE WRIT

THIS CASE RAISES QUESTIONS REGARDING PLRA FEE LIMITATIONS IDENTICAL TO THOSE RAISED IN *JOHNSON v. HADIX*, No. 28-262. THIS COURT SHOULD GRANT CERTIORARI IN THE INSTANT CASE FOR THE SAME REASONS IT GRANTED CERTIORARI IN *HADIX*, OR ALTERNATIVELY, IT SHOULD HOLD THIS CASE IN ABEYANCE PENDING THIS COURT'S DECISION IN *HADIX*.

The Sixth Circuit's opinion in this case, declining to apply the PLRA attorney fee limits, was based entirely on the Circuit's earlier opinion in *Hadix v. Johnson*, 143 F.3d 246, 255-56 (6th Cir. 1998), cert granted, *Johnson v. Hadix*, 119 S.Ct. 508, (U.S. Nov 16, 1998) (No. 98-262), in which that court held that the PLRA does not apply to any attorney fees awarded in a case pending prior to the effective date of the PLRA, regardless of when the legal work was done and regardless of whether the fees were awarded after the effective date of the PLRA, conflicts with all other circuits which have reviewed this issue.

The Fourth, Eighth and Ninth Circuit Courts of Appeal have held that the PLRA's attorney fee provisions apply to legal fees earned in actions pending on the date of enactment. *Alexander S. v Boyd*, 113 F.3d 1373 (4th Cir. 1997) *cert. den.* 139 L. Ed. 2d 869 (1998); *Williams v. Brimeyer*, 122 F.3d 1093 (8th Cir. 1997) (holding that fees for work performed after the PLRA's enactment are subject to the PLRA limitations, though the case was pending prior to the PLRA's enactment); *Madrid v. Gomez*, 150 F.3d 1030, (9th Cir., 1998).

The D.C. Circuit held that for work performed after the effective date of the PLRA, there is no retroactivity concern in applying the fee limitations of the statute. In dicta the D.C. Circuit indicated that for cases pending on the effective date

of the PLRA, legal work performed prior to the effective date of the act would not be limited by the PLRA. *Inmates of D.C. Jail v. Jackson,* 158 F.3d 1357 (D.C. Cir. 1998).

The Seventh Circuit held that where the district court awarded fees prior to the PLRA enactment, those fees were not subject to the PLRA limits, though the case was still pending on appeal when the PLRA was enacted. *Cooper v. Casey* 97 F.3d 914, 921 (7th Cir. 1996). In a similar case, *Jensen v. Clark*, 94 F.3d 1191 (8th Cir. 1996), the Eighth Circuit held that where the district court entered judgment and an award of attorney fees long before the PLRA was enacted, the PLRA limits on fees were inapplicable, though the case was pending on appeal when the PLRA was enacted. The D.C. Circuit was not called upon to decide the issue of whether fees for services performed prior to the PLRA's enactment are subject to the PLRA limits, but indicated in dicta that it would likely hold that the PLRA limits would not apply. *Inmates of D.C. Jail v. Jackson*, 158 F.3d 1357, 1360 (D. C. Cir. 1998).

The Second Circuit held that the PLRA does not apply to fees for work performed pre-enactment though fees for that work were awarded by the district court after the PLRA was enacted. *Blissett v. Casey,* 147 F.3d 218 (2d Cir. 1998) The Second Circuit did not, however, address the question of fees for work performed post-enactment in a case which was filed prior to the PLRA's enactment. The Second Circuit also suggested, without citing any authority, that the question of whether to apply PLRA limits to fees awarded for work performed after the PLRA's enactment might be left to the discretion of the district court.

The Sixth Circuit stands alone in its position that the PLRA does not apply to any fees awarded in § 1983 actions filed before the statute's enactment. *Hadix v. Johnson,* 143 F.3d 246 (6th Cir. 1998), cert. granted sub nom *Johnson v. Hadix,* No. 98-262. This Court granted certiorari in *Hadix* to address these questions: 1. Whether, in litigation pending on the effective date of the Prison Litigation Reform Act, the attorney fee provision of PLRA Sec. 803(d), 42 U.S.C. Sec. 1997e(d), applies to fees awarded after the Act's effective date for services rendered after that date. 2. Whether, in such

litigation, this fee provision applies to fees awarded after the Act's effective date for services rendered before that date. The instant case presents these identical issues.

This Court has repeatedly held that certiorari review is appropriate where there is a conflict among the several courts of appeal regarding the general principles or reasoning. Supreme Court Rule 10(a); *United States v. National Bank of Commerce*, 472 U.S. 713, 719 (1985); *Oregon Dep't of Fish and Wildlife v. Klamath Tribe*, 473 U.S. 753, 764 (1985); *Ivan Allen Co. v. United States*, 422 U.S. 617, 623-24 (1975).

The Court of Appeals in the instant case has misapprehended decisions of this Court and the intent of Congress on an important federal question being litigated throughout the country. The PLRA is comprised of ten sections; the attorney fee provisions are contained in § 803 which is codified at 42 U.S.C. § 1997e(d). The Court of Appeals failed to give effect to the plain language of § 803 which is applicable to all litigation brought by prisoners, no matter when begun. The clear and unambiguous words of the statute apply to all pending cases and all awards of attorney's fees made after the Act's effective date: "In *any* action brought by a prisoner who *is* confined. . . in which attorney fees are authorized. . . . No *award* . . . shall be based. . . ." Only § 802, dealing with injunctions, consent decrees and other prospective relief in prison litigation, codified at 18 U.S.C. § 3626, expressly applies to pending actions. The Court of Appeals erred by concluding that Congress's inclusion of a provision applying a different part of the Act (section 802) to pending cases, combined with the absence of any explicit provision prescribing the fee provisions' reach, implies that Congress intended the fee provisions to apply only to cases filed after the Act's passage.

In the absence of conclusive evidence of congressional intent the inquiry turns to whether the provision, if retrospectively applied, would have an impermissible retroactive effect. The plain text of section 803(d), the nature of attorney fee awards and this Court's longstanding retroactivity jurisprudence all support the conclusion that the attorney fee limitation applies to attorney fee awards made

after the effective date of the Act, regardless of when the services were rendered. Even though the statute does not expressly state that it is applicable to pending cases, this Court's longstanding retroactivity jurisprudence compels that result. As the Supreme Court stated in *Landgraf*, normally " 'a court is to apply the law in effect at the time it renders its decision.'" 511 U.S. at 264, 114 S. Ct. 1483 (quoting *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711, 94 S. Ct. 2006, 40 L. Ed. 2d 476 (1974)).

Questions of attorney's fees are "collateral to the main cause of action" and are "uniquely separable" from it. *Landgraf v. USI Film Products*, 511 U.S. 244, 277 (1994). There is no support for the proposition that attorney fees under 42 U.S.C. § 1988 are not collateral, but integral to the underlying case. The law clearly reflects that collection of attorney fees under 42 U.S.C. § 1988 is ancillary to the relief sought to remedy the underlying violation. *Hutto v. Finney*, 437 U.S. 678, 695; *Plaut v. Spendthrift*, 514 U.S. 211, 131 L. Ed. 2d 328, 353; 115 S. Ct. 1447 (1995). In *Hutto*, this Court states that 42 U.S.C. § 1988 imposes attorney's fees "as part of the costs":

> Unlike ordinary "retroactive" relief such as damages or restitution, an award of costs does not compensate the plaintiff for the injury that first brought him into court. Instead, the award reimburses him for a portion of the expenses he incurred in seeking prospective relief.

Hutto, 437 U.S. at 695, fn 24.

Fee shifting statutes like the one at issue here are procedural in nature, prospective and injunctive in operation and do not involve vested rights. Because the desire for attorney's fees at an ever-increasing "prevailing rate" is merely a unilateral hope rather than an entitlement, applying an intervening fee shifting statute in pending litigation does not result in any unfairness. The appropriate compensation for plaintiffs' counsel in prisoner litigation is subject to the discretion of Congress and there is no constitutional, statutory or jurisprudential reason not to give effect to Congress's obvious intent in all cases where attorney's fee awards are

made after the effective date of section 803(d), regardless of when the services were rendered.

In each of *Bradley*, *Hutto* and *Langraf*, the cases were pending on appeal when the new statute at issue was enacted and the provisions of the new statute were nonetheless applied. In the instant case, the case was still pending in the district court when the PLRA was enacted. Respondents did not file their ultimately successful petition for fees until after the enactment of the PLRA. The status of the instant case argues more strongly for application of the new law, i.e., the law in effect at the time the court reached its decision on the attorney fees petition. In the instant case, no "rights previously vested are injuriously affected" *Landgraf* at 128 L. Ed. 2d at 256 by applying the PLRA, since no decision had been made as to what constituted a reasonable attorney fee by the district court in this case, until months after the PLRA took effect. Therefore, applying the PLRA here would have no "retroactive" effect.

This Court has already granted certiorari to review these questions in *Hadix*. Unless this Court reverses the erroneous decision of the Court of Appeals in *Hadix* and in this case, Michigan taxpayers will be required to pay hundreds of thousands of dollars in attorney fees under the PLRA, 42 U.S.C. § 1997e(d), contrary to the clear dictates of the act. The fees at issue in the instant case should be subject to the jurisprudence of this Court as will be set forth in the upcoming decision in *Hadix*. Accordingly, this Court should hold this case in abeyance pending a decision in *Hadix* and, upon such decision, summarily reverse the court below or vacate the decision below and remand for consideration of this Court's opinion in *Hadix*.

CONCLUSION

For all these reasons, Petitioners respectfully urge this Court to grant certiorari or, in the alternative, hold this case in abeyance pending a decision in *Hadix* and upon that decision, remand for consideration of this Court's decision in *Hadix*.

Respectfully submitted,

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March, 1999

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JEFFREY DYE and
GREGORY TURNER,

Plaintiffs,

CASE No. 95-70065
HONORABLE AVERN COHN

v.

WAYNE JACKSON,

Defendant.

MEMORANDUM AND ORDER

I.

This is an attorney's fees application, 42 U.S.C. § 1988. Daniel Manville (Manville) and Michael J. Steinberg (Steinberg), attorneys for Jeffrey Dye (Dye) and Gregory Turner (Turner), have requested award of their attorney's fees for representing prevailing plaintiffs in a prisoner-civil rights case, 42 U.S.C. § 1983. Manville seeks $36,000 in fees, Steinberg seeks $6250 in fees, and both request costs of $1627.[1] Defendant Wayne Jackson (Jackson), a former corrections officer, argues that their fee request must be reduced pursuant to the Prison Litigation Reform Act of 1995 (PLRA), 42 U.S.C. § 1997e(d). Manville and Steinberg contend that the PLRA does not apply retroactively and, in the alternative, is unconstitutional.

For the reasons that follow, Manville and Steinberg's applications are GRANTED without the limitations imposed by the PLRA. Because Jackson has not opposed the itemized

[1] Manville and Steinberg also jointly request fees for litigating their fees in the amount of $13,555.

hours on the applications, Manville and Steinberg will be compensated according to their calculations.

II.

Dye and Turner, inmates of Jackson Prison, suffered stab wounds while incarcerated. In 1995, Dye and Turner sued Jackson, the one-time deputy warden of the prison, and their cases were tried to juries on four separate occasions. At the first trial in May 1996, a jury hung on a 4-4 vote. In July 1996, at the second trial a jury found liability and proximate cause, but zero damage. The Court granted Dye and Turner's motion for new trials solely on the issue of compensatory damages. At the third trial in November 1996, a jury awarded Turner $13,000. At the fourth trial shortly thereafter, a jury awarded Dye $5000.

III.

Attorneys for prevailing plaintiffs in 42 U.S.C. § 1983 cases may recover their reasonable attorney's fees and costs. 42 U.S.C. § 1988. In representing Dye and Turner, Manville and Steinberg won money judgments and as such are entitled to fees for representing prevailing plaintiffs. *Farrar v. Hobby*, 506 U.S. 103, 111 (1992) ("[To qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought....). Manville and Steinberg are also entitled to their reasonable costs and expenses. *Northcross v. Board of Education of the Memphis City Schools*, 611 F.2d 624, 639 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980)

A.

Jackson argues that attorney's fee provisions of .the PLRA, 42 U.S.C. § 1997e(d), also apply to Manville and Steinberg. The Act went into effect on April 26, 1996, and the attorney's fee provisions are as follows:

> (1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized

under section 1988 of this title, such fees shall not be awarded, except to the extent that--

(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights-protected by a statute pursuant to which a fee may be awarded under section 1988 of this title; and

(B) (i) the amount of the fee is proportionately related to the court ordered relief for the violation; or

(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation;

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150% of the judgment, the excess shall be paid by the defendant.

(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18, for payment of courtappointed counsel.

42 U.S.C. § 1997e(d)

Based on the PLRA, Jackson argues that Manville and Steinberg's fees should be calculated as follows:

- Manville and Steinberg can recover no more than 150% of the judgments, or $27,000, from Jackson. They would have to collect any fees in excess of $27,000 from Dye and Turner. 42 U.S.C. § 1997e(d) (2).

- Manville and Steinberg's hourly rates would be capped

at $112.50, instead of $150 and $125 respectively. 42 U.S.C. § 1997e(d)(3).

- Manville and Steinberg must recover as much as 25% of the base $27,000 from Dye and Turner, which in this case would be $4500. 42 U.S.C. § 1997e(d) (2)

- Manville and Steinberg cannot recover the fees incurred in litigating for their fees. 42 U.S.C. § 1997e(d) (1)

B.

Assuming Jackson's reading of 42 U.S.C. § 1997e(d) is correct, the PLRA nevertheless does not apply to Manville and Steinberg. Manville and Steinberg filed this case in 1995, and the PLRA took effect on April 26, 1996. The PLRA attorney compensation provisions are not retroactive. *See Cooper v. Casey*, 97 F.3d 914, 921 (7th Cir. 1996); *Jensen v. Clarke*, 94 F.3d 1191, 1201-03 (8th Cir. 1996). To apply the PLRA provisions now would work an injustice to Manville and Steinberg's settled expectations in taking on this case. As the United States Court of Appeals for the Seventh Circuit stated:

> To give (the PLRA retroactive] effect would attach (without clear indication of congressional intent to do so) new legal consequences to completed conduct, namely the services rendered by the plaintiffs' counsel in advance of the passage of the new Act.

Cooper, 97 F.3d at 921 (citing *Landgraf v. USI Film Products*, 511 U.S. 244, 269-70 (1994)).

Jackson argues, however, that the PLRA applies to all of Manville and Steinberg's work performed after the PLRA date of enactment of April 26, 1996. For example, in *Hadix v Johnson*, 947 F. Supp. 1113 (E.D. Mich. 1996) (Feikens, J.), the district court applied the PLRA's lower hourly rates to an attorney's work performed after the date of enactment, even though the case was filed prior to the date of enactment. *Id.* at 1115. The district court reasoned:

> I cannot say that Congress's intent to limit

> plaintiffs' counsel to $112.50 per hour is so fundamentally unfair as to result in manifest injustice. Nor can I say that this legislation unreasonably disrupts settled expectations.

Id.

The Court does not agree with the holding of *Hadix*. In *Hadix* the district court inexplicably considered only the lowerhourly rates of the PLRA, despite the directive that "[w]e do not...construe statutory phrases in isolation; we read statutes as a whole." *United States v. Morton*, 467 U.S. 822, 828 (1984).[2] If all attorney's fee provisions of the PLRA are fully implemented, however, the PLRA would limit Manville and Steinberg's fees in more significant ways than reducing their hourly rates. For example, Manville and Steinberg would have to collect as much as $19,000 from Dye and Turner. Manville and Steinberg possibly could not recover the fees for litigating for their fees.

When examining the proposed retroactivity of a given statute, the Seventh Circuit refused to look at one section in isolation. "[I]n this case, we cannot look only at the effective date section itself. 'In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.'" *Orreao v. 833 West Buena Joint Venture*, 943 F.2d 730, 734 (7th Cir. 1991) (quoting *K Mart Corp. v. Cartier. Inc.*, 486 U.S. 281, 291 (1988)). Examining the PLRA

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[2] *See also Llamas-Almaguer v. Wainwright*, 666 F.2d 191, 194 (5th Cir. Unit B 1982) ("The courts may not pick and choose the sections of title III to which they will give or not give full effect, based on their own views of the virtues and vices of the exclusionary rule of *Mapp v. Ohio.*"); *Bates & Rogers Construction Corp. v. Continental Bank*, 97 B.R. 905, 907 (N.D. Ill. 1989) ("(C]ourts are not allowed to pick and choose which subsections of a statute they wish to apply when Congress has directed that an entire section shall apply in a given situation.").

In the analogous situation of interpreting seemingly conflicting statutes, "[j]udges 'are not at liberty to pick and choose among congressional enactments, and when two (or more] statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" *County of Yakima v Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 265-66 (1992) (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).

in its entirety, if the PLRA is applied to fees incurred after the date of enactment, such application would work retroactively because it would limit Manville and Steinberg's fees incurred prior to the date of enactment. To fully apply the PLRA to post-April 26, 1996 work would also shift the burden for many of Manville and Steinberg's fees to Dye and Turner, who presumably did not contemplate such burdens when they decided to sue Jackson. The PLRA would upset the settled expectations of Dye and Turner in bringing suit, as well as the settled expectations of Manville and Steinberg in representing them. In the absence of an explicit congressional directive, application of the PLRA in this situation has an impermissible retroactive effect. *See Landgraf*, 511 U.S. at 270.

Thus Manville and Steinberg should be reasonably compensated under 42 U.S.C. § 1988. The Court has previously compensated Manville at the rate of $150 per hour and Steinberg at the rate of $125 per hour. Jackson apparently does not dispute the time billed, and thus Manville and Steinberg are to be fully compensated.[3]

IV.

For the reasons stated above, Manville and Steinberg's application is GRANTED. Manville shall receive $41,130 in fees, Steinberg shall receive $14,675 in fees, and both shall receive $1627 in costs. If necessary, an appropriate form of judgment shall be submitted on notice by Dye and Turner.

SO ORDERED.

DATED: May 22, 1997
Detroit, Michigan

AVERN COHN
UNITED STATES DISTRICT JUDGE

[3] Because the PLPA does not apply to Manville and Steinberg's attorney's fees, the Court will not address their argument that the PLRA is unconstitutional under *Romer v. Evans*, 116 5. Ct. 1620 (1996).

FILED
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LEONARD GREEN, *Clerk*

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Nos. 96-2545/96-2569/97-1717

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JEFFREY DYE and GREGORY TURNER,

Plaintiffs-Appellees,

v.

WAYNE JACKSON, ,
DEPUTY WARDEN

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

Defendant-Appellant,

JOHN JABE and Manager HAWKINS,

Defendants.
_____/

BEFORE: MARTIN, Chief Judge; KENNEDY and SILER, Circuit Judges.

PER CURIAM. These three consolidated appeals arise from a complaint filed on January 6, 1995, in the Eastern District of Michigan by Gregory Turner and Jeffrey Dye, inmates of the Jackson State Prison of Southern Michigan, who sought damages for violations of their constitutional rights under 42 U.S.C. § 1983. In the underlying action, Turner and Dye alleged that Deputy Warden Wayne Jackson acted with deliberate indifference to threats against Turner and Dye's safety in violation of their Eighth Amendment right to be free from cruel and unusual punishment.

In 1982, Turner pled guilty to a charge of second degree murder. Since that time, he has been confined in various facilities of the Michigan Department of Corrections. After his incarceration, Turner testified against his co-defendant, Keith Lewis, who was ultimately convicted of first degree murder and sentenced to mandatory life imprisonment. Turner was given no promises by the state for his testimony, except that he would be assigned to a prison where Lewis was not an inmate because Lewis and his friends had threatened to injure Turner in retaliation for his testimony against Lewis.

However, in 1987, both Lewis and Turner were confined to the Jackson State Prison. At this time, Lewis and his friends threatened Turner, who alerted Jackson about his fears for his own safety. Jackson told Turner to send him a note indicating his concern for his personal safety. Turner claims he wrote at least three letters to Jackson and spoke with him on multiple occasions about the threats Lewis had made against him. Turner also arranged for his mother to speak with Jackson about transfening Turner to another facility. Jackson took no action to protect Turner, and on September 18 another inmate, associated with Lewis, stabbed Turner in the chest. The resulting wounds required surgery and Turner was hospitalized for nine days.

Similarly, a fellow inmate stabbed Dye, despite his having repeatedly warned Jackson of the threats made against his personal safety and requests for protection. On October 28, Dye was transferred to Jackson State Prison. He was stabbed in the yard that same day by members of a prison gang that he had refused to join. After this initial stabbing, Dye claims to have written at least three or four letters to Jackson concerning his fears for his personal safety and also arranged for his mother to speak with Jackson. On December 15, Dye personally met with Jackson, who told him not to worry about the threats.

Later that day, Jackson transferred Dye to 4-block, a maximum security block, and the most notoriously violent block in the facility. Fearing for his safety, Dye did not leave his cell in 4-block from December 16 to 19. When he left to call his mother on December 19, three masked inmates stabbed

him: twice in the head, twice in the back, and once in the neck.

Turner and Dye brought a joint § 1983 action against Jackson, alleging that his deliberate indifference to the threats made against their personal safety violated their Eighth Amendment rights. Jackson moved for summary judgment. The district court denied his motion and the case proceeded to a trial which resulted in a hung jury. In a new trial, the jury found that Jackson's deliberate indifference caused Turner's and Dye's injuries, but awarded zero damages to both Turner and Dye.

Jackson then moved for judgment as a matter of law and Turner and Dye moved for a new trial limited to the issues of compensatory and punitive damages. The district court denied Jackson's motion and ordered a new trial on the issue of compensatory damages only. In separate trials limited to the issue of compensatory damages, juries awarded Turner and Dye damages in the amount of $5,000 and $13,000, respectively. As prevailing parties, Turner and Dye sought and were awarded attorney's fees and costs under 42 U.S.C. § 1988.

Jackson appeals the denial of his motion for judgment as matter of law, alleging error in both the joinder of the plaintiffs and the granting of a new trial on the issue of damages alone. Jackson also argues that the Prison Litigation Reform Act, 42 U.S.C. § 1997e, should be applied retroactively, thereby limiting the award of attorneys' fees. Turner and Dye cross-appeal, urging that the trial court erred in failing to give the jury an instruction regarding punitive damages.

Jackson's appeal of the district court's denial of his motion for judgment as a matter of law cannot succeed. First, the district court's decision to join the plaintiffs in this action was appropriate. Rule 20(a) of the Federal Rules of Civil Procedure permits plaintiffs to join in a single action "if they assert any right to relief; jointly, severally, or in the alternative. . . arising out of the same transaction, occurrence, or series of transactions or occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action." In *Lasa Per L 'Industria Del Marmo Societa Per Azioni v. Alexander*, 414 F.2d 143, 147

(6th Cir. 1969), we held that the terms "transaction or occurrence" are to be given a broad and liberal interpretation. The district court determined that because both events occurred at the same place, and because two trials would have caused the same witnesses to be called twice, judicial economy favored allowing both Turner and Dye to proceed in a single action. Such a determination was within the district court's discretion, therefore its decision to allow joinder of the actions stands.

Jackson's second allegation, that the district court should have granted his motion for judgment as a matter of law because the jury did not award Turner and Dye any damages, also cannot succeed. This Court recently held in *AIG Aviation, Inc. v. Boorom Aircraft, Inc.*, 1998 WL 69013, *5 (6th Cir. 1998) (unpublished *per curiam* opinion), that where a jury finds a defendant liable for injuries to a plaintiff but does not award the plaintiff any damages for those injuries, it is appropriate to grant a new trial limited to the issue of damages. Therefore the district court acted within the scope of its discretion when it granted a new trial limited to the determination of damages.

Jackson's final ground for appeal, that the Prison Litigation Reform Act should be applied retroactively to limit Dye and Turner's recovery of attorney's fees also fails. In *Hadix v. Johnson*, 143 F.3d 246, 248 (6th Cir. 1998), this Court held that the Act should not be applied retroactively.

We have also considered the other issues brought on appeal by the parties to this case and find them to be without merit.

For the foregoing reasons, the district court is AFFIRMED.

SILER, Circuit Judge, concurring in part and dissenting in part. I concur in the majority opinion relating to the case by Jeffrey Dye, but I respectfully dissent from the decision in the case involving Gregory Turner.

I do not think that Turner proved deliberate indifference by Jackson. Turner told Jackson about threats from Keith Lewis. Turner's mother also spoke with Jackson about transferring Turner to another facility. However, there was no specific information about a threat from Lewis's friends. As it turned out, the attack,on Turner was by someone other than Lewis, who was separated in the prison from Turner. The person who stabbed Turner was Peterson Bay, who was a "Moore," apparently a gang in which Lewis was a member. Turner had a warning from Cunningham Bay about two hours before he was stabbed, but he did not tell Jackson or anyone else on the staff about this threat. Turner also testified at the trial that he was not concerned about all the Moores and "Mobites," apparently another gang. He was just concerned about harm from Lewis. Admittedly, Turner's mother told Jackson that "Keith Lewis and his gang" were trying to kill Turner, but if Turner himself did not tell Jackson of his fear of the gang, an action for deliberate indifference to his welfare should not lie.

In order for Jackson to be liable, he must have known of a strong likelihood, not a possibility, of a risk of injury. *See Brown v. Hughes,* 894F.2d 1533, 1537 (11th Cir. 1990). Certainly, there was a likelihood of injury from Lewis, but if Turner himself did not fear other members of the gang, then Jackson would also not have known of any risk of injury.

For these reasons, I would reverse the judgment on behalf of Turner against Jackson.

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No. 98-1494

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

Wayne Jackson – PETITIONER
(Your Name)

VS.

Jeffrey Dye – RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The ~~petitioner~~ Respondent asks leave to file the attached ~~petition for writ of certiorari~~ Brief in Opposition without prepayment of costs and to proceed *in forma pauperis*.

[ ] ~~Petitioner~~ Respondent has previously been granted leave to proceed *in forma pauperis* in the following court(s):

_____

_____

[X] ~~Petitioner~~ Respondent has not previously been granted leave to proceed *in forma pauperis* in any other court in this matter.

~~Petitioner~~ Respondent's affidavit or declaration in support of this motion is attached hereto.

Jeffrey Dye-Q
(Signature)

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AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Jeffrey Dyer, am the ~~petitioner~~ Respondent in the above-entitled case. In support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

I further swear that the responses I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes ___ No X

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of salary or wages per month which you received. CLERK AT MARQUETTE BRANCH PRISON MY WAGES WAS $36.00 A MONTH!

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? Yes ___ No X

a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or have a checking or savings account? Yes ___ No X

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing) Yes ___ No X

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. RONNIE D. MC CONNAL (SON)

I declare under penalty of perjury that the foregoing is true and correct.
Executed on: APRIL 5th, 19 99

Jeffrey Dyer
(Signature)

No. 98-1494

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

Wayne Jackson – PETITIONER
(Your Name)

VS.

Gregory S. Turner – RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The ~~petitioner~~ asks leave to file the attached ~~petition for writ of certiorari~~ Brief in Opposition without prepayment of costs and to proceed *in forma pauperis*.

[ ] ~~Petitioner~~ Respondent has previously been granted leave to proceed *in forma pauperis* in the following court(s):

[X] ~~Petitioner~~ Respondent has not previously been granted leave to proceed *in forma pauperis* in any other court in this matter.

~~Petitioner~~ Respondent's affidavit or declaration in support of this motion is attached hereto.

Gregory S. Turner
(Signature)

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Gregory Turner, am the ~~petitioner~~ Respondent in the above-entitled case. In support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

I further swear that the responses I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes ___ No ✓
   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of salary or wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? Yes ___ No ✓

   a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or have a checking or savings account? Yes ___ No ✓

   a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing) Yes ___ No ✓

   a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I declare under penalty of perjury that the foregoing is true and correct.
Executed on: APRIL 5, 1999.

Gregory S. Turner
(Signature)

No. 98-1494

In the Supreme Court of the United States
October Term, 1998

WAYNE JACKSON, DEPUTY WARDEN,

Petitioner,

-v-

JEFFREY DYE and GREGORY TURNER,

Respondents,

Brief In Opposition to
Petition For Writ of Certiorari
To The United States Court Of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED FOR REVIEW BY PETITIONER

Does the attorney fees provision of the Prison Litigation Reform Act, PLRA § 803, 42 U.S.C. § 1997e(d), apply to fees for services in a case seeking damages which was pending on the effective date of the PLRA?

THE PETITIONER'S QUESTION SHOULD HAVE BEEN SUBDIVIDED TO INCLUDE THE BELOW QUESTIONS SINCE THE ISSUE OF RETROACTIVITY OF THE PLRA IS BEFORE THIS COURT IN THE CASE OF Hadix v. Johnson, 143 F.3d 246 (6th Cir. 1988), cert. granted Johnson v. Hadix, 119 S.Ct. 508 (1998). THESE QUESTIONS WERE PRESENTED TO THE SIXTH CIRCUIT WHICH REJECTED THEM.

Does the attorney fees provision of the Prison Litigation Reform Act, PLRA § 803, 42 U.S.C. § 1997e(d)(2), which requires up to 25% of the inmate's judgment to be applied to any fee award, is applicable in a case awarding damages which was pending on the effective date of the PLRA?

Did the district court abuse its discretion when it refused to award any portion of the inmate's damage award toward the attorney fees that were ultimately awarded?

Does the attorney fees provision of the Prison Litigation Reform Act, PLRA § 803, 42 U.S.C. § 1997e(d)(1)(A), which states that fees shall not be awarded except to the extent that the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights, preclude an award of fees for litigating fees in the district court after a damage judgment has been obtained?

PARTIES TO THE PROCEEDING

Respondents do not dispute Petitioner's designation of parties.

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JURISDICTION

Respondents do not dispute this Court's jurisdiction to review the judgment pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

The Petitioner is claiming that this case raises questions regarding PLRA fee limitations identical to those raised in Johnson v Hadix, No. 98-262, which arguments were held this past month. This claim by the Petitioner is not entirely correct. It is true that the issue of retroactivity of the fee provision of the PLRA is the same in both cases. However, there are other issues in this case which are not part of the Hadix case. The petitioner's question presented to this Court should have been subdivided to include the below questions:

> Does the attorney fee provision of the Prison Litigation Reform Act, PLRA § 803, 42 U.S.C. § 1997e(d)(2), which requires up to 25% of the inmate's damage judgment to be applied to any fee award, apply in a case where damages was awarded after the effective date of the PLRA but the case was pending on the effective date of the PLRA?
>
> Did the district court abuse its discretion when it refused to award any portion of the inmates' damage award toward the attorney fees that were ultimately awarded?
>
> Does the attorney fees provision of the Prison Litigation Reform Act, PLRA § 803, 42 U.S.C. § 1997e(d)(1)(A), which states that fees shall not be awarded except to the extent that the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights, preclude an award of fees for litigating fees after a damage judgment has been obtained?

Furthermore, it seems that the issue in Hadix involves whether the PLRA applies to hours billed only after the effective date of the Act and not to hours billed prior to the effective date of the Act. If this is true, this case is not similar to the Hadix

litigation as claimed by the Petitioner.

This case is brought pursuant to 42 U.S.C. § 1983. Respondents filed this lawsuit for damages in 1995, claiming that Petitioner had substantial knowledge of the existence of a serious risk of their being assaulted and failed to take reasonable steps to protect them from that risk in violation of the Eighth Amendment to the United States Constitution. At trial, Respondents proved that they not only informed the petitioner of this risk but that their mothers had also called the petitioner and informed him of such. Each of the respondents was ultimately assaulted by other inmates and received serious injuries. When the case was initially tried, it resulted in a hung jury. On a retrial, a second jury found liability but awarded no damages. The Petitioner moved for a judgment as a matter of law, while respondents moved for a new trial as to damages only. The district court granted respondents' motion for a new trial as to damages only and ordered that the damage portion for each respondent would be tried before separate juries. At these trials for damages, the district court refused to instruct the jury as to the issue of punitive damages.

The third and fourth juries awarded Respondent Turner $13,000 and Respondent Dye $5,000. The district court entered judgment on December 2, 1996. App. 12a. Counsel for Respondents then filed an

application for attorney fees and costs. Counsel Manville sought $36,000 in fees at an hourly rate of $150. Counsel Steinberg sought $6,250 in fees at an hourly rate of $125.00. App. 1a-6a. In addition, Counsel filed a supplemental brief seeking $13,555, as attorney fees for litigating the question of attorney fees. App. 1a, n.1.

The Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 132-66 (1996) (PLRA), took effect on April 26, 1996. The PLRA was intended to stem the tide of frivolous prisoner suits and to curtail the overly intrusive involvement of federal courts in managing state prison systems pursuant to remedial orders and consent decrees. See Petitioner's Petition for Certiorari, at 4-5 and n. 2. The Legislative History of the PLRA does not demonstrate that it was enacted to impact negatively on meritorious lawsuits brought by prisoners but just on frivolous lawsuits.

This case was filed prior to the effective date of the PLRA but the jury verdicts were not obtained until post PLRA. Upon entry of the judgments, the prisoners then sought attorney fees for the hours spent prior to and after the effective date of the PLRA. The defendants alleged that the § 803(2) of the PLRA applied to all hours spent on this litigation. The defendant also sought to have the district court award 25% of the damages toward the fees awarded. Further, the defendant argued that plaintiffs were not

entitled to fees for litigating fees since these hours were not directly and reasonably incurred in proving an actual violation of plaintiff's rights. The district court held that the PLRA did not apply to cases pending when it was enacted. The court of appeals affirmed.

REASONS FOR DENYING THE WRIT

I. THE CIRCUIT COURT CORRECTLY HELD THAT SECTION 803(d) OF THE PLRA DOES NOT APPLY TO LIMIT ENTITLEMENT TO ATTORNEY FEES IN CASES PENDING ON THE DATE OF ITS ENACTMENT

A. The Statutory Language of The PLRA's Fee Provisions Do Not Clearly and Unambiguously Indicate Congressional Intent to Apply It's Limitations Retroactively

The first question to be asked in determining whether a statute applies to pending cases is whether Congress has expressly resolved, by clearly stating in unambiguous language, that the statutory provisions at issue apply to pending cases. Landgraf v. USI Film Products, 511 U.S. 244, 280, 114 S.Ct. 1483 (1994). This Court recently emphasized it's ruling in Landgraf v. USI Film Products, that in order to apply a statute retroactively there must be an "extraordinarily clear statement of Congressional intent" of retroactive application. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059 (1997).[1]

The statutory language at issue in Lindh which directs that "an application for writ of habeas corpus shall not be granted," except as otherwise provided, was found not sufficiently clear to

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[1] Demonstrating the rigor with which this Court enforces it's "clear statement" rules, Lindh gave as an example of possible unambiguous intent the following language: "This Act shall apply to all proceedings pending on or commenced after the date of the enactment of the Act." Lindh, supra at 2064 n. 4, citing Landgraf v. USI Film Products, 511 U.S. 244, 260 (1994).

overcome the longstanding presumption against retroactive legislation.

The language at issue in §803 of the PLRA parallels the language at issue in Lindh, directing that: "fees shall not be awarded" except as otherwise provided, and similarly fails to meet the stringent requirement of an expression of Congressional intent to apply the Act to pending cases.[2]

Absent unequivocal language prescribing the temporal reach of the statute and in the face of clear language in another section of this statute (802(b)(1), the Sixth Circuit correctly ruled it should follow the holding in Hadix v. Johnson, 143 F.3d 246 (6th Cir. 1998), which held that the PLRA's fee provisions set forth in §803(d) are inapplicable to these fee petitions which included both work performed prior to and after the PLRA's enactment date.

B. Application Of The Canons Of Statutory Interpretation Which Must Be Applied Unless There Is Clear Evidence Of Retroactive Legislative Intent Mandate That The PLRA Fee Provisions Not Be Applied To Pending Cases

In Lindh, this Court was asked to decide whether certain provisions of the Anti-Terrorism and Effective Death Penalty Act of

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[2] The vast majority of district courts and the Second, Sixth, Seventh and Eighth Circuits have held that the statute's language does not evince a sufficiently clear intent to apply the fee limitations of the PLRA to pending cases. Blissett v. Casey, 147 F.3d 218 (2nd Cir. 1998); Hadix v. Johnson, 144 F.3d 925 (6th Cir. 1998); Cooper v. Casey, 97 F.3d 914 (7th Cir. 1996); Jensen v. Clarke, 94 F.3d 1191 (8th Cir. 1996).

1996 (hereinafter "AEDPA"), which amended the federal habeas statute applied to an application for habeas pending at the time the new statute was enacted.[3] The court held that because one Section of the AEDPA explicitly applied to pending cases and the other relevant section did not, this evidenced clear congressional intent that the latter section would not apply to pending cases. Lindh v. Murphy, 117 S.Ct at 2063.

A similar analysis applied to the PLRA requires the same conclusion. The attorney fee provisions of the PLRA, amending 42 U.S.C. §1997e, are found in §803 of the Act. This section is silent as to whether it should be applied retroactively to pending cases or prospectively to cases filed after the Act's passage. In stark contrast, §802 of the Act, which addresses "appropriate remedies" in prison conditions litigation explicitly provides that the section is to be applied to pending cases stating:

> Section 3626 of Title 18 United States Code as amended by this Section shall apply with respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of the enactment of this title.[4]

---

[3] The AEDPA consists of two chapters, one of which governs capital cases and explicitly provides that it "shall apply to cases pending on or after the date of enactment of this act." The other chapter - the one at issue in Lindh - governs non-capital cases and provides only that "[a]n application for a writ of habeas corpus...shall not be granted" except as provided. 28 U.S.C. Section 2254(d). Lindh, supra at 2063-2065.

[4] In Hadix, the Sixth Circuit detailed the legislative history of the PLRA noting that as it made it's way through the

This Court held that the nearly identical difference between two sections of the AEDPA indicated Congress' intent that the latter provision should be applied only to cases filed after enactment of AEDPA. Lindh, 117 S.Ct. at 2063. This Court found this "negative implication []" to be particularly pronounced because "the two chapters had already been joined together [in a single bill] and were being considered simultaneously when the language raising the implication was inserted," although they began life independently and in different houses of Congress. Id. at 2065.

As in Lindh, the negative inference in the PLRA's §803 is particularly strong because the PLRA's legislative history shows that sections 802 and 803 "had already been joined together and were considered simultaneously when the language raising the implication was inserted." Lindh, 117 S.Ct. at 2065.[5]

---

legislative process the two sections were originally joined together with the attorney fee and other remedy provisions appearing together in a single section subject to an explicit statement of applicability to all pending cases. Thereafter the attorney fees provision was extracted from this section and transferred to a new section of the bill (Section 803) which did not contain a retroactivity provision. The statute retained this structure until it's final passage. Hadix, supra 143 at 253-55.

[5] The Lindh Court thereafter ruled that where there is no risk of retroactive effect, the Court need not apply the judicial default rules traditionally employed in the second step of this Court's analysis in Landgraf stating: "Although Landgrafs default rule would deny application when a retroactive effect would otherwise result, other construction rules may apply to remove even the possibility of retroactivity (as by rendering the statutory provision wholly inapplicable to a particular case), as

While noting distinctions between the PLRA and AEDPA the Hadix Court found that the "identical negative inference that was drawn in Lindh can be drawn when Sections 802 and 803 are compared." Supra at 143 F.3d at 254-55. The Congressional removal of the attorney fees provisions from the section which explicitly provided for its application to pending cases, to a section which did not so provide, evince Congressional intent that this provision is only to be applied prospectively, i.e., to prisoners' cases brought after the effective date of the Act.

C. Application Of The PLRA's Fee Provisions To The Present Cases Would Constitute An Impermissible Retroactive Application Of The Act And Constitute Manifest Injustice To The Plaintiffs

In light of the statutory language and the application of the canons of statutory construction, one need not resort to the application of "judicial default rules," even under this analysis the provisions of this Act should not be applied retroactively. Landgraf v. USI File Products, supra. The judicial default rules are guided by the presumption against retroactively applying laws to pending cases absent clear legislative intent:

Lindh argues the recognition of a negative implication would do here. In sum, if the application of a term would be retroactive as to Lindh, the term will not be applied, even if, in the absence of retroactive effect, we might find the term inapplicable; if it would be prospective, the particular degree of prospectivity intended in the Act will be identified in the normal course in order to determine whether the term does apply to Lindh. Lindh, 117 S.Ct. at 2063.

> [T]he presumption against retroactive legislation is deeply rooted in our jurisprudence and embodies a legal doctrine centuries older than our republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to perform their conduct accordingly; settled expectations should not be lightly disrupted. Id. at 1497. (internal footnote omitted).

Where after analyzing the legislative history, Congressional intent regarding a statute's reach is still unclear a court's next task is to determine whether application of the statute to a case based on events that occurred before the statute's passage would have a retroactive effect.

> [F]amiliar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance. Id. at 1499-1500.

Landgraf describing circumstances that constitute impermissible retroactive effect, this Court noted that:

> [E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retroactive. Id. at 1505.[6]

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[6] This language does not purport to define the outer limit of impermissible retroactivity. Rather, our opinion in Landraf, like that of Justice Story, merely described that any such effect constituted a sufficient, rather than a necessary, condition for invoking the presumption against retroactivity. Indeed, we recognized that the Court has used various formulations to describe the "functional conception of legislative 'retroactivity,' and made no suggestion that Justice Story's formulation was the exclusive definition of presumptively impermissible retroactive legislation." Hughes Aircraft Co. v. United ex rel. Shumes, 520 U.S. 939, 117 S.Ct. 1871, 1876 (1997).

Application of the PLRA's attorney fee provisions to this case would have an impermissible retroactive effect that would result in manifest injustice to the Plaintiffs. Such application would deny Plaintiffs' counsel "fair notices" that counsel, who are all private practitioners undertook, this litigation with the settled expectation that they would be compensated for the hours that were reasonably spent litigating the case at the prevailing market rate for attorneys with similar experience and skill.

If the attorney fee provisions of the PLRA are applied to this case, Plaintiffs' counsel would be compensated well below market rates for hours reasonably spent in successfully obtaining a monetary judgment for each of the plaintiffs. The reduction brought by the PLRA's restrictions would attach new legal consequences to events completed before the PLRA's enactment -- the assumption of this representation for these Plaintiffs at the expense of handling other litigation -- and take-away rights acquired under then-existing laws.[7] The relevant event for

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[7] As recognized by the court in Jensen v. Clarke, 94 F.3d 1191 (8th Cir. 1996): "Nothing in this portion of the Act expressly prescribes its reach. The Act was not in effect when the plaintiffs' attorneys accepted this appointment, when liability and fee determinations were made [.] ... When the plaintiffs' attorneys were exerting what the District Court quite fairly described as "herculean" efforts on their behalf, they expected to have their fee determined under Section 1988. If we apply the Act, those expectations will be foiled. Thus, application of the Act is this case would have the retroactive effect of disappointing reasonable reliance on prior law. That leaves us with the "traditional presumption" against retroactive application...It would be "manifestly unjust" to upset

measuring expectations of attorney fees is not, as Defendants argue the date counsel performed work but rather the date counsel agreed to take the case. It is at that time that Plaintiffs and their counsel, relying upon the law providing for compensation at prevailing market rates should Plaintiffs prevail that counsel evaluates the case, the likelihood of success and the expectations of reimbursement at a reasonable rate should they prevail. It is at this time that Plaintiffs' counsel committed themselves ethically to representation of these prisoners to ensure that the Constitution is honored.[8]

Given these considerations, and given the fact that Plaintiffs and Plaintiffs' counsel did not have "fair notice" that their fees would be radically cut during the course of the litigation, the provisions would have "retroactive effect" if applied to the present cases.[9]

[plaintiffs'] reasonable expectations and impose new guidelines at this late date."

[8] The Ninth Circuit panel in Madrid v. Gomez concurred in finding that the relevant date for measuring expectations is "the moment when counsel agreed to take the case." 150 F.3d at 1039. The court, however, concludes that expections of recovery at that time were too uncertain, failing to recognize that balancing the uncertainty with a reliance upon the knowledge that if one does prevail, compensation will be at a fair market rate is the basis upon which an evaluation is made prior to deciding whether to take a case.

[9] The settled expectation is for compensation at the prevailing market rate, whatever that may be, not to any specific pre-determined hourly amount.

II. ANY CONFLICT BETWEEN THE REASONING OF THE CIRCUITS ON THIS ISSUE HAS BEEN RESOLVED BY THIS COURT'S SUBSEQUENT OPINIONS

Defendants urge review of the Sixth Circuit's opinion to resolve a conflict among the circuits. The differences in the reasonings of the circuit opinions which have addressed the retroactive application of the PLRA's fee provisions do not warrant a grant of certiorari in this case.

Defendants argue that the Sixth Circuit's opinion stands alone in opposition to three circuit decisions holding that the PLRA's fee limitations apply to cases pending on the date of its enactment. Defendants' Petition pp. 8-9 referencing Alexander S. v. Boyd, 113 F.3d 1373 (4th Cir. 1997), cert. denied, 139 L. Ed. 2d 869 (1918); Madrid v. Gomez, 150 F.3d 1030 (9th Cir. 1998), reh'g pet. filed and Williams v. Brimeyer, 122 F.3d 1093 (8th Cir. 1997).

Defendants however fail to advise this Court that the Williams holding, issued as a two-page order, was rejected by a subsequent decision of the Eighth Circuit holding that the PLRA's fee provisions do not apply to pending cases, Weaver v. Clarke, 120 F.3d 852 (8th Cir. 1997), cert. denied, 118 S.Ct. 898 (1998) (relying upon Jensen v. Clarke, 94 F.3d 1191 (8th Cir. 1996)) and that Alexander S. was decided prior to and without the benefit of and is inconsistent with this Court's treatment of the retroactivity issue in Lindh v. Murphy, supra.

The only circuit decision which was issued after Lindh is the

Ninth Circuit's opinion in Madrid. However as plaintiffs have requested a rehearing, asserting that the panel's holding in Madrid conflicts with the retroactivity analysis of a prior en banc decision of the circuit in Jeffries v. Wood, 114 F.3d 1484 (9th Cir. 1997), and the court had ordered briefing on these issues, the final outcome of this decision remains uncertain.

The only final circuit decisions issued after Lindh that address the PLRA's applicability to post-enactment attorney fees is the Sixth Circuit case in Hadix v. Johnson, supra, and the Second Circuit's opinion in Blissett v. Casey, 147 F.3d 218 (2nd Cir. 1998). These decisions properly apply Lindh's rulings to the attorney fee provisions of the PLRA in holding that the fee provisions do not apply retroactively to limit Plaintiffs' attorney fees in pending cases.

There is also no conflict on the questions of whether the Act's limitations apply retroactively to limit attorney fees for services performed prior to the effective date of the Act and "awarded" subsequent to the Act's passage.[10] The statutory language of the Act makes no distinction between services performed prior to the Act's effectiveness as opposed to services performed after its passage.

The courts, both at the circuit and district level, have been

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[10] This case involves the applicability of the Act to both pre and post-passage fees for litigating an Eighth Amendment claim for damages.

nearly uniform in holding that Section 803(d) does not apply to "awards" of attorney fees for services performed prior to the passage of the Act. The opinions are based on a consistent finding that the statutory language does not evince a clear intent as to its temporal reach.[11] Utilizing the statutory analysis prescribed in Landgraf, courts have proceeded with a judicial default inquiry and ruled that application of the Act to pre-passage services would constitute an impermissible retroactive application. Cooper v. Casey, 97 F.3d 914 (7th Cir. 1996); Jensen v. Clarke, 94 F.3d 1191 (8th Cir. 1996);[12] Glover v. Johnson, 138 F.3d 229, 249 (6th Cir. 1998).[13]

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[11] The one dissention from this analysis was Alexander S. v. Boyd, 113 F.3d 1373 (4th Cir. 1997), cert. den'd, 118 S.Ct. 880 (1998). A divided panel ruled that the PLRA restrictions applied to work performed both before and after the effective date of the Act offering different rationales for this decision. Alexander S. v. Boyd, 113 F.3d at 1385-1386, 1388, 1392-1393 as noted.

[12] The rationale of Jensen is not limited to pre-enactment fees. The Eighth Circuit subsequently relied on Jensen to affirm awards of §1988 attorney fees that were made after the effective date of the PLRA, holding that Jensen rejected retroactive application of the PLRA's fee provision. See Weaver v. Clarke, 120 F.3d 852, 853 (8th Cir. 1997), cert. denied, 118 S.Ct. 898 (1998).

[13] In addition, nearly every district court which has considered the question has also found the PLRA's attorney fee provision inapplicable to pre-passage work. Blissett v. Casey, 969 F. Supp. 118 (N.D.N.Y. 1997) (refusing to apply restrictions to attorneys fees earned after PLRA went into effect when case was pending on effective date); Hadix v. Johnson, 965 F. Supp. 996 (W.D. Mich. 1997) (same). There are also a number of unreported district court opinions refusing to apply the PLRA fees restrictions in cases that were pending when the Act became

In light of the uniformity in decisions and this Court's recent decisions on statutory retroactivity, a grant of certiorari in not warranted in this case.

All of the circuit courts decisions on the issue of whether the PLRA applies to limit attorney fees for post-enactment services began their analysis by determining whether the statutory language itself evinced a sufficient, clear and unambiguous Congressional intent to apply this statute retroactively sufficient to overcome the presumption against such retroactive application of statutes. Each circuit court found that the statutory language itself was ambiguous and did not clearly specify the temporal reach of the statute.[14] Courts then diverged in their analysis of the retroactive applicability under judicial default rules. The different conclusions reached by these cases are the result of some of these cases being decided prior to this Court's ruling in Lindh or apparently without consulting this opinion.

The Sixth Circuit correctly rejected the distinction between pre and post enactment fees under the PLRA as such a distinction

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effective. Tragale v. Scheel, No. CV-N-93-672-DWH (D. Nev. May 21, 1997); Browning v. Vernon, No. Civ. 91-0409-5 BLW (D. Idaho March 7, 1997); Coleman v. Wilson, No. CIV 5-90-0520 LKK JFM (E.D. Cal. Jan 21, 1997); Perrier v. City of Albuquerque, No. Civ. 95-943 RLP/WWD (D.N.M. Dec. 17, 1996); Miller-Bey v. Stiller, No. 93-CV-72111, 1997, U.S. Dist. LEXIS 8524 (E.D. Mich. Feb. 25, 1997).

[14] The principle opinions in Alexander opined that "nothing in § 803 of the PLRA expressly prescribes it's reach."

would require an interpretation of the same statutory language to convey Congressional intent to apply § 803 to pending cases for post-enactment fees but not apply it to pending cases for pre-enactment fees. Accordingly, the court said:

> We do not believe the statutory language is capable of such a sophisticated construction; either the fee provision applies to pending cases or not. Hadix, supra 143 F.3d at 252.

Both the Second Circuit in Blissett and the Sixth Circuit in Hadix, who have analyzed the statute subsequent to this Court's ruling in Lindh, proceeded after determining that the statutory language was not clear enough to overcome the presumption of retroactivity and then applied the canons of statutory construction mandated by this Court in Lindh. There exists no conflict for the court to resolve where the only final circuit decisions, Blissett and Hadix, which analyzed the statute's provisions pursuant to this Court's rulings in Lindh and Hughes, are both consistent and correctly apply this Court's rulings.

CONCLUSION

The Sixth Circuit Court of Appeals correctly held that the attorney fee provisions of the PLRA are inapplicable to these cases which were pending and in which judgments were rendered prior to the effective date of the Act.

RELIEF SOUGHT

WHEREFORE, Plaintiffs-Respondents respectfully request that this Court deny the Petition for Writ of Certiorari or if it is granted that the sub-issues listed be included.

Respectfully submitted,

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